**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 23430-4-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| **FRANCISCO Y. RAMIREZ-MEDINA,** | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |

**BROWN, J.—**Francisco Ramirez-Medina was convicted of possessing methamphetamine with intent to deliver and second degree unlawful possession of a firearm after a stipulated facts bench trial. On appeal, Mr. Ramirez-Medina contends the court erred in denying his suppression motion; insufficient evidence supports his conviction for possessing methamphetamine with intent to deliver; his stipulated facts trial was actually an improper guilty plea; ineffective assistance of counsel; and his standard sentencing range was miscalculated. We reject each contention and affirm.

## FACTS

On February 28, 2004 at 12:10 a.m., Officer Heather Kelly responded to a

malicious mischief report of several Hispanic males hitting a car with bats at 224 N. Delaware Street, Wenatchee, Washington. Within a minute of the call, Officer Kelly passed a white car going southbound on Delaware. She testified she "made a point to look at it - - this incident just occurring - - look at the car and then . . . continued northbound on Delaware." Report of Proceedings (RP) (July 1, 2004) at 15. She testified she arrived at the scene in about one minute of the report, saw a car having no windows, saw signs of broken glass, and received information from a man standing right next to the car:

> And there was also a Hispanic gentleman standing on the sidewalk, I don't know who he was, he pointed in the direction of the vehicle that I had just passed, the only other vehicle on the road and said, that car right there, that car right there.
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> And I had my window rolled down and I said, that car? And I stuck my arm out the window and pointed in the direction of the car I had passed. And I said, that car right there, was that car involved? And he said, yes, yes.
>
> So I got on my radio to advise other units who were coming in the area that this white car that I had passed may be involved. At that point I didn't know for sure, I didn't know if he was a direct witness or what but I had to go with what I was being told.

RP (July 1, 2004) at 15-16. Officer Kelly did not get the man's name.

Within about one minute of the report, Officer Brian Miller stopped the white car after hearing Officer Kelly's broadcasted request. Officer Miller told the white female driver, Crystal Bourton, and the passenger, Mr. Ramirez-Medina, to put their hands on the steering wheel and dash. Officer Miller asked if there were any weapons in the car.

Mr. Ramirez-Medina initially moved his hands down to his sides near his pockets and then reportedly began a number of erratic movements, appearing to Officer Miller as attempts to either locate or hide something that could be a weapon.

Officer Robert Smet opened the passenger door, removed Mr. Ramirez-Medina, and patted him down. Officer Smet found a pistol in Mr. Ramirez-Medina's right coat pocket. After receiving *Miranda*[1] warnings, Mr. Ramirez-Medina admitted he did not have a concealed weapons permit and was arrested. During his arrest search, officers found a gun, three baggies containing 60.8 grams of methamphetamine, two baggies and one bindle of marijuana, $380 in cash, and a cell phone.

The State charged Mr. Ramirez-Medina with possessing methamphetamine with intent to deliver, carrying a concealed weapon, manufacturing marijuana, and unlawful possession of a firearm. The information included school zone and firearm enhancements. Although Mr. Ramirez-Medina was cleared in the described incident, he was charged with unrelated first degree malicious mischief.

Mr. Ramirez-Medina filed an evidence suppression motion arguing an unlawful stop. After a joint CrR 3.5 and 3.6 hearing, Judge Lesley Allan denied the motion.

As part of a plea bargain, the State dropped the marijuana manufacturing, concealed weapon, and school zone enhancement portions of the information, thus reducing the statutory maximum sentence from 20 years to 10 years. The State agreed to recommend the 120-month maximum. Mr. Ramirez-Medina's calculated standard

[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

range was 104-136 months. In exchange, partly to preserve his appeal rights, Mr. Ramirez-Medina agreed to plead guilty to third degree malicious mischief and submit to a stipulated facts trial on the remaining charges. The stipulated facts included Mr. Ramirez-Medina's admission that he possessed methamphetamine with the intent to deliver and he was armed with a firearm in violation of RCW 9.41.040(1)(b).

Judge John E. Bridges convicted Mr. Ramirez-Medina of possession of methamphetamine with the intent to deliver and second degree unlawful possession of a firearm and found he was armed with a firearm. After Judge Bridges sentenced Mr. Ramirez-Medina to the jointly recommended 120 months, he appealed.

## ANALYSIS

### A. Evidence Suppression

The issue is whether under the above facts the court erred in concluding the circumstances justified an investigatory stop of Ms. Bourton's car and denying Mr. Ramirez-Medina's motion to suppress the evidence found during his search and arrest.

We review a trial court's findings of fact on a motion to suppress for substantial evidence. *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the court's finding. *Id.* at 644. We review conclusions of law de novo. *State v. Johnson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

"An officer may briefly detain occupants of a vehicle for investigation if the circumstances satisfy the *Terry*[2] stop reasonable suspicion standard." *State v.*

*Carlson,* 130 Wn. App. 589, 593, 123 P.3d 891 (2005) (citing *State v. Mendez,* 137 Wn.2d 208, 220, 970 P.2d 722 (1999)). This requires "specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry,* 392 U.S. at 21. Articulable suspicion is "'a substantial possibility that criminal conduct has occurred or is about to occur.'" *State v. Kennedy,* 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (quoting 3 William LaFavre, Search & Seizure § 9.2, at 65 (1978)). Intrusion reasonableness is determined from the totality of the circumstances known by the officer at the inception of the stop. *State v. Glover,* 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Mr. Ramirez-Medina argues the officers lacked reasonable suspicion to stop the car because the informant was both unidentified and wrong. "An informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.'" *State v. Sieler,* 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (citing *Adams v. Williams,* 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *State v. Lesnick,* 84 Wn.2d 940, 943, 530 P.2d 243 (1975)). Reasonable suspicion to stop requires "'circumstances suggesting the informant's reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer's information was obtained in a reliable fashion.'" *Seiler*, 95 Wn.2d at 47 (quoting *Lesnick,* 84 Wn.2d at 943).

Within one minute of the report, Officer Kelly saw a white car leaving the

[2] *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

reported crime area, the sole car in sight. At the scene, Officer Kelly saw a parked car with broken windows and glass underneath, consistent with the report. An unidentified male standing next to the car pointed to the departing white car, giving Officer Kelly both visual and verbal information reasonably leading her to connect the white car to a crime. Thus, Officer Kelly had more than "a bare conclusion" from an unidentified informant. The court correctly found the officers possessed a well-founded, articulable suspicion of criminal activity and a connection to the occupants of the white car warranting the investigatory stop. While the citizen's tip was erroneous, the officers' suspicion was nonetheless reasonable. *See State v. Seagull,* 95 Wn.2d 898, 908, 632 P.2d 44 (1981) (holding, "[t]he Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones." (citations omitted)).

Alternatively, Mr. Ramirez-Medina contends even if the officers had reasonable suspicion to make the initial investigatory stop of the vehicle, the search scope became excessive when the officers removed him from the car and patted him down. Mr. Ramirez-Medina argues it was unreasonable to believe he could be involved in the malicious mischief incident, considering the officers did not see any bats and a white female was driving the car.

If an investigatory stop is justified, an officer may briefly search for weapons if the officer reasonably believes an officer safety search is necessary. *State v. Duncan,* 146 Wn.2d 166, 172, 43 P.3d 513 (2002). A passenger may be ordered out of the car if the officer has an articulable safety rationale. *State v. Mendez,* 137 Wn.2d 208, 212,

970 P.2d 722 (1999). Occupant behavior is one relevant factor warranting passenger removal. *Id.* at 220-21.

The findings show Mr. Ramirez-Medina failed to comply with officer commands to keep his hands exposed, made a series of unusual, frantic hand movements, and appeared to be either looking for something or attempting to hide something. The officers reasonably believed he could have a weapon. Mr. Ramirez-Medina failed to comply with the officers' resulting commands to exit the car. The facts support the officers' safety concerns and justified the *Terry* search of Mr. Ramirez-Medina's person for weapons. *See State v. Day,* 130 Wn. App. 622, 628, 124 P.3d 335 (2005).

The court did not err in denying Mr. Ramirez-Medina's suppression motion.

**B. Evidence Sufficiency**

The issue is whether sufficient evidence exists to convict Mr. Ramirez-Medina of possessing methamphetamine with intent to deliver.

The test for sufficiency of the evidence is whether, after viewing the evidence and all reasonable inferences most favorably to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). We defer to the trier of fact to weigh the evidence and judge the credibility of the witnesses. *State v. Bryant,* 89 Wn. App. 857, 869, 950 P.2d 1004 (1998) (citing *State v. Hayes,* 81 Wn. App. 425, 430, 914 P.2d 788 (1996)). Direct and circumstantial evidence can equally infer guilt. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

Possessing a controlled substance alone is insufficient to establish an inference of intent to deliver, even if the amount is greater than deemed usual for personal use. *State v. Lopez,* 79 Wn. App. 755, 768, 904 P.2d 1179 (1995) (citing *State v. Harris,* 14 Wn. App. 414, 418, 542 P.2d 122 (1975)). Generally, at least one additional factor indicative of distribution is required. *State v. Hutchins,* 73 Wn. App. 211, 216, 868 P.2d 196 (1994). These factors include a large amount of cash or paraphernalia, such as scales, baggies, cell phones, and address lists. *State v. Campos,* 100 Wn. App. 218, 223, 998 P.2d 893 (2000); *State v. Brown,* 68 Wn. App. 480, 482, 484-85, 843 P.2d 1098 (1993); *see, e.g., State v. Hagler,* 74 Wn. App. 232, 236, 872 P.2d 85 (1994) (large amount of cocaine and $342 sufficient to establish intent to deliver).

Here, Mr. Ramirez-Medina possessed a large quantity of methamphetamine – 60.8 grams packaged in three separate baggies, marijuana – packaged separately, a cell phone, a loaded gun, and $380. From this evidence, a trier of fact could infer Mr. Ramirez-Medina intended to deliver methamphetamine. The evidence is sufficient.

**C. Stipulated Trial**

The issue presented by Mr. Ramirez-Medina is whether the trial court permitted him to plead guilty in the guise of a stipulated facts trial. However, Mr. Ramirez-Medina's issue statement is based upon an incorrect premise. The record discloses solely a stipulated facts trial that included Mr. Ramirez-Medina's admissions for the purpose of preserving his suppression issues rejected in Part A. of this opinion. The implicit ineffective assistance of counsel claim is discussed separately in Part D. of this

opinion.

A guilty plea is functionally and qualitatively different from a stipulated facts trial; the former results in a conviction and waives the right to appeal. *State v. Wiley,* 26 Wn. App. 422, 425, 613 P.2d 549 (1980) (citing *State v. Saylors,* 70 Wn.2d 7, 9, 422 P.2d 477 (1966)). The trial stipulation admits "that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." *Wiley,* 26 Wn. App. at 425. The trial court must still determine the defendant's guilt or innocence, the State must prove guilt beyond a reasonable doubt, and the defendant may offer evidence. *State v. Johnson,* 104 Wn.2d 338, 342, 705 P.2d 773 (1985). As such, defense counsel may not stipulate to conclusions of law that his client is guilty. *State v. Mierz,* 127 Wn.2d 460, 469, 901 P.2d 286 (1995).

The record shows the court considered the stipulated facts, the record from the CrR 3.5 and 3.6 hearing, the affidavits of probable cause, and the police reports in making its ruling. The court independently assessed the facts. *Mierz,* 127 Wn.2d at 470. Mr. Ramirez-Medina related he understood the implications of his stipulated facts trial. He filed a carefully explained jury trial waiver. The trial court explained the consequences of being found guilty in the stipulated facts trial. The stipulated facts were provided as part of a plea agreement, through which Mr. Ramirez-Medina avoided the risk of a sentence exceeding 120 months and a first strike. In Part B, we found sufficient evidence supports his conviction. Given all, Mr. Ramirez-Medina cannot show legally cognizable harm from his stipulation. He did not plead guilty as now

claimed.

**D. Assistance of Counsel**

The issue is whether Mr. Ramirez-Medina received ineffective assistance of counsel. He contends his counsel was deficient in allowing him to stipulate he intended to deliver methamphetamine without sufficient evidence to prove this charge. We have rejected his evidence sufficiency contentions in Part B, obviating the need for further analysis here.

Ineffective assistance of counsel requires showing both performance falling below an objective standard of reasonableness and some resulting prejudice to the defendant. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Stenson,* 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). We strongly presume counsel's performance was effective. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Our review shows able assistance from Mr. Ramirez-Medina's trial counsel in negotiating a stipulated trial as part of an interrelated plea-dismissal bargain. The result favorably resolved his unrelated malicious mischief charge by plea and disposed of the other charges by dismissal, reducing risk to a 10-year maximum while preserving his suppression-issue appeal. The tactical and seemingly beneficial decisions do not support his ineffective assistance claim. Moreover, he fails to show harm from his plea

bargain. In sum, Mr. Ramirez-Medina fails to show either deficient performance or resulting prejudice from his trial counsel's performance.

**E. Sentencing Range**

The issue is whether the court erred in calculating Mr. Ramirez-Medina's standard sentencing range.

Consistent with the bargained-for joint recommendation, the court sentenced Mr. Ramirez-Medina to 120 months, including a 36-month firearm enhancement. The sentence is equal to the maximum sentence for a Class B felony. Mr. Ramirez-Medina recognized his calculated standard range for the remaining charges, including the 36-month firearm enhancement, was 104-136 months, but also recognized the court was limited to a sentence solely up to the statutory maximum. The 120-month sentence recommended by the State, stipulated by Mr. Ramirez-Medina, and adopted by the court is properly within the standard range.

Under RCW 9.94A.530(1), a sentencing range is determined by offender score and offense seriousness level. The court correctly found Mr. Ramirez-Medina's offense seriousness level was three, as a "felony offense under chapter 69.50 RCW with a deadly weapon special verdict under RCW 9.94A.602." RCW 9.94A.518. Possessing methamphetamine with intent to deliver falls under this statute. RCW 69.50.401(b). While Mr. Ramirez-Medina argues he should have been sentenced under the RCW 9.94A.510 sentencing grid, he was properly sentenced under the more specific "Drug Offense Sentencing Grid" contained in RCW 9.94A.517.

For the first time in his reply brief, he alleges a double jeopardy violation because his sentence was enhanced twice on the basis of the firearm – once to increase the seriousness level of the crime and once as a sentencing enhancement. Washington courts have repeatedly rejected double jeopardy arguments regarding weapon enhancements. *State v. Huested,* 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (citing *State v. Claborn,* 95 Wn.2d 629, 628 P.2d 467 (1981)), *review denied*, 151 Wn.2d 1014 (2004). Our courts have specifically rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. *See State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542 (1987); *State v. Pentland,* 43 Wn. App. 808, 811, 719 P.2d 605 (1986).

The applicable statutes unambiguously provide for seriousness level increases if the defendant is found to be armed with a deadly weapon (*see* RCW 9.94A.517 and .518). A sentencing enhancement is mandatory for crimes committed with a firearm. *See* RCW 9.94A.533. In sum, Mr. Ramirez-Medina's sentence did not violate the double jeopardy clause.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE AFFIRM:

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Schultheis, A.C.J.

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Kulik, J.